

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 99-F-16

Date issued: December 23, 1999

Requested by: Bruce Hagen, President, North Dakota Public Service Commission

- QUESTION PRESENTED -

Whether the 1995 amendments to N.D.C.C. § 49-21-01.2 removed the jurisdiction of the Public Service Commission under N.D.C.C. § 49-04-05 to review the sale or merger of telephone cooperatives and small telecommunications companies with fewer than 8,000 local exchange subscribers.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that the 1995 amendments to N.D.C.C. § 49-21-01.2 removed the jurisdiction of the Public Service Commission under N.D.C.C. § 49-04-05 to review the sale or merger of all telecommunications companies, including telephone cooperatives and small telecommunications companies with less than 8,000 local exchange subscribers.

- ANALYSIS -

Although the Public Service Commission (PSC) is a constitutional office, its powers are prescribed by law. N.D. Const. art. V, § 2. The North Dakota Supreme Court has repeatedly held that the PSC has only the powers and duties conferred on it by the Legislature. Capital Elec. Co-op., Inc. v. Public Service Comm'n, 534 N.W.2d 587 (N.D. 1995); Cass County Elec. Coop., Inc. v. Northern States Power Co., 518 N.W.2d 216 (N.D. 1994).

[The PSC] can initiate no public policies of its own. It can act in no field which the Legislature has not authorized it to enter.

Grafton v. Otter Tail Power Co., 86 N.W.2d 197, 202 (N.D. 1957). In discussing the PSC's authority to review sales and mergers of public utilities, the North Dakota Supreme Court has observed that the PSC "has only such powers, in the regulation of public utilities, as have been conferred upon it by the Legislature." Otter Tail Power Co. v. Clark, 229 N.W. 915, 919 (N.D. 1930).

Under these decisions, a review of the extent of the PSC's regulatory authority must take place in the context of the PSC exercising its statutory powers. C.f. Montana Dakota Utilities v. Public Service Comm'n, 847 P.2d 978 (Wyo. 1993).

Although this court cannot usurp the legislative function delegated to PSC, when we review that agency's exercise of its statutory powers we must keep in mind that as a regulatory agency PSC "has no inherent or common-law powers. Stated in another manner, an administrative body has only the power and authority granted by the constitution or statutes creating the same. Such statutes must be strictly construed or 'any reasonable doubt of existence of any power must be resolved against the exercise thereof. A doubtful power does not exist.'"

Id. at 983 (citations omitted).

N.D.C.C. ch. 49-21 is the chapter of the code specifically pertaining to telecommunications companies. In that chapter, telecommunications companies are expressly made exempt from several chapters of the code relating to public utilities in general, including N.D.C.C. ch. 49-04. N.D.C.C. § 49-21-01.2. N.D.C.C. § 49-04-05 requires prior approval by the PSC before a public utility may "dispose of, encumber, merge, or consolidate its franchise, works, or system necessary or useful in the performance of its duties to the public," with certain exceptions.¹

The definition of "telecommunications company" as used in N.D.C.C. ch. 49-21 refers to any "person" engaged in furnishing telecommunications services in this state. N.D.C.C. § 49-21-01(19). The term "person" would apply equally to investor-owned companies and telephone cooperatives. See N.D.C.C. § 1-01-49(8); N.D.C.C. chs. 10-15, 10-19.1. Thus, under the plain language of N.D.C.C. § 49-21-01.2, the PSC has no jurisdiction under N.D.C.C. § 49-04-05

¹ This opinion does not address the separate authority of the PSC to grant a certificate of public convenience and necessity based on the statutory factors specifically listed in N.D.C.C. § 49-03.1-04.

to review a merger or sale of a telecommunications company, regardless of whether the company is a for-profit stock corporation or a cooperative.

One could argue that, notwithstanding the clear language in N.D.C.C. § 49-21-01.2, N.D.C.C. § 49-02-01.1 gives the PSC authority under N.D.C.C. § 49-04-05 to review sales and mergers by telephone cooperatives and other telecommunications companies with less than 8,000 local exchange subscribers. The specific language in N.D.C.C. § 49-02-01.1 states: "Nothing in this section limits the authority of the commission under . . . section 49-04-05." (Emphasis added). This is not an affirmative grant of authority to the PSC, but rather is a statement removing any negative inference that the preceding language in that section removed PSC authority over the listed organizations. The phrase "[n]othing in this section" in the above-quoted sentence further indicates it has no effect on limits to the PSC's authority which may be located in other sections of the North Dakota Century Code. Thus, there is no conflict between the restrictive language in the last sentence of N.D.C.C. § 49-02-01.1 and the clear exemption in N.D.C.C. § 49-21-01.2.

To the extent a conflict exists between N.D.C.C. §§ 49-02-01.1 and 49-21-01.2 regarding the PSC's jurisdiction over mergers and sales of telephone cooperatives under N.D.C.C. § 49-04-05, the rules governing statutory conflicts resolve that conflict against the PSC's jurisdiction. See generally N.D.C.C. § 1-02-39.

Until 1995, all telecommunications companies were required to obtain approval from the PSC of any sale or merger. In response to comments regarding the pending sale of several telephone exchanges currently owned by a large investor-owned telecommunications company, a legislative conference committee adopted, and the Legislative Assembly ultimately approved, the following amendment to N.D.C.C. § 49-21-01.2:

Except as provided for in this chapter and section 49-02-01.1, 49-02-21, 49-02-22, and 49-04-02.2, ~~and 49-04-05,~~ telecommunications companies and all telecommunications services are exempt from the provisions of chapters 49-2, 49-04, 49-05, and 49-06. . . .

1995 N.D. Sess. Laws ch. 30, § 5.

The legislative history of the 1995 amendments to N.D.C.C. § 49-21-01.2 is directly on point for this question. The written testimony of Illona Jeffcoat-Sacco, Public Utilities Director

for the PSC, clearly expresses her opinion that the proposed amendment to N.D.C.C. § 49-21-01.2 could be interpreted to "override 49-02-01.1." She further observed that if the amendment does not "override" N.D.C.C. § 49-02-01.1, then cooperatives will be subject to regulation when the larger investor-owned companies would not. Unfortunately, although the differing interpretations were squarely presented to the conference committee members, the committee and Legislative Assembly did not take any action to remove the ambiguity.

Legislative approval of the amendments may indicate approval of the distinction between large investor-owned telecommunications companies and telephone cooperatives and small companies. However, an equally strong argument may be made that legislative approval of the amendments, particularly by the legislators who were not members of the conference committee before whom the ambiguity was raised, indicates support for the plain meaning of the amendments to N.D.C.C. § 49-21-01.2: the PSC is no longer authorized to review the sale or merger of any telecommunications company, including a cooperative. One can only speculate on the intent of the committee members or the full Legislature regarding the 1995 amendments.

Other rules of statutory construction are equally unhelpful. N.D.C.C. § 49-02-01.1 specifically applies to cooperatives, but applies to public utilities in general. N.D.C.C. § 49-21-01.2 specifically applies to all telecommunications services, but applies to all companies equally. The question of which statute is specific and which is general depends on whether you first approach the question from the nature of the public utility or the form of business. Since the 1995 amendment to N.D.C.C. § 49-21-01.2 was the last pertinent amendment to either section, this factor slightly favors relying on the plain language of that section, but the ambiguous legislative history of the amendments does not give much weight to the timing of the amendment.

Deference is given to an agency interpretation of its statutes, but only if such interpretation is longstanding and consistent with the plain language of the statutes. Peterson v. Heitkamp, 442 N.W.2d 219 (N.D. 1989). Here, the amendments are only four years old and appear to be clear and unambiguous.

Statutes are also construed, when possible, to give meaning to every word and phrase. Here, interpreting N.D.C.C. § 49-21-01.2 as precluding PSC jurisdiction over sales and mergers of telecommunications companies does not render meaningless the last sentence of N.D.C.C. § 49-02-01.1, because that sentence would continue to apply to other utility cooperatives or small companies.

On the other hand, interpreting N.D.C.C. § 49-21-01.2 as not applying to telephone cooperatives and other small telecommunications companies would add a qualification to the plain language of the statute which is not found in its text. Statutes are interpreted based on their plain language and not on what a person thinks the Legislature meant to say. See N.D.C.C. § 1-02-05 (plain language is not to be disregarded under a pretext of pursuing the spirit of a statute).

As stated earlier, there does not appear to be a conflict between N.D.C.C. §§ 49-02-01.1 and 49-21-01.2 over the application of N.D.C.C. § 49-04-05. However, assuming a conflict exists, the persuasive rule of statutory construction, in my opinion, is that statutes are construed to avoid constitutional conflicts. N.D.C.C. § 1-02-38(1); McCabe v. North Dakota Workers Compensation Bureau, 567 N.W.2d 201 (N.D. 1997).

The interpretation of the relevant statutes urged by the Bureau in this case would raise significant constitutional conflicts. This case presents ambiguous statutes capable of two different constructions, one of doubtful constitutional validity. Accordingly, we adopt the construction that does not raise constitutional conflicts.

McCabe, 567 N.W.2d at 205.

Serious equal protection concerns arise if the statutes cited above are interpreted to give the PSC jurisdiction over the sale or merger of telephone cooperatives and other small telecommunications companies but not large investor-owned telecommunications companies. See also N.D. Const. art. IV, § 13 (the legislative assembly shall not enact special laws). To avoid a constitutional challenge to N.D.C.C. § 49-21-01.2, it must be construed to exempt sales and mergers by telephone cooperatives and other small telecommunications companies from PSC oversight just as the statute exempts sales and mergers by an investor-owned company with more than 8,000 local exchange subscribers.

It is understandable to be concerned with removing the sales and mergers of telecommunications companies from governmental oversight. As one member of the conference committee observed, "telephone service is an essential part of our society today." Conference Committee Hearing on S. 2008 54th N.D. Leg. (April 5, 1995) (statement of Representative Tollefson). One of the members of the PSC warned the committee that the amendments being considered "relate not only to this particular case, but affect the way the Commission will be

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able to approach all future sales of telephone exchanges." Id.
(Written testimony of Susan Wefald). Nevertheless, the wisdom of removing sales and mergers of telecommunications companies, including cooperatives, from the PSC's jurisdiction is a matter of public policy which is left to the Legislative Assembly under the North Dakota Constitution.

In conclusion, it is my opinion that the 1995 amendments to N.D.C.C. § 49-21-01.2 removed the jurisdiction of the PSC under N.D.C.C. § 49-04-05 to review the sale or merger of all telecommunications companies, including telephone cooperatives and small telecommunications companies with less than 8,000 local exchange subscribers.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented decided by the courts.

Heidi Heitkamp
Attorney General

Assisted by: James C. Fleming
Assistant Attorney General

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